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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AGAPITO SANTIAGO MARTINEZ,

Defendant and Appellant.

D048250

(Super. Ct. No. SCN186829)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

A jury convicted Agapito Santiago Martinez of two counts of committing a lewd act upon a child and one count of burglary and found true certain enhancements. Martinez appeals, contending: (1) insufficient evidence supported the burglary conviction; (2) the trial court erred by not sua sponte instructing the jury on the defense of unconditional possessory right to enter; and (3) his counsel provided ineffective assistance. We reject his contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At around noon on January 24, 2003, seven-year-old Rebecca L. knocked on the door to her new neighbor's home to meet any children that might live there. Martinez answered the door and told her that his children were not home. He then stroked Rebecca's face and hair, told her she was pretty and invited her inside. Rebecca noticed paint cans and plastic covering the floor and saw a car seat bench in the dining area of the home. Martinez sat on the bench, pulled Rebecca onto his lap and asked her if she wanted to look at a children's book. Although Martinez had his hands on Rebecca's legs, she did not think they were "doing anything."

When Rebecca did not want to look at the book, they got up and Martinez led her into a bedroom holding onto the sides of her dress as she walked to prevent her from getting any paint on it. As Rebecca stood in the room, Martinez kneeled down beside her and put his hand on her panties over her vaginal area. When Martinez asked Rebecca if his touching felt good, she said it did because she was too afraid to say no. Martinez then began hugging her as she tried to get away. Martinez finally let her go after she told him that she would come back after lunch. Rebecca walked to the front door and tried to leave, but the door was locked. After Martinez complied with Rebecca's request to open the door, she immediately left and went to the home of her babysitter, Lindsey S.

Rebecca told Lindsey what had happened and showed her where Martinez had touched her. The two went to Rebecca's house and after hearing what had occurred, Rebecca's mother called the police. Deputy Sheriff Dwain Washington responded to the call and visited Martinez at the home after speaking to Rebecca and her mother.

Martinez denied Rebecca's visit, stating that the home belonged to his "grandmother" and that he lived elsewhere.

Later that day, Deputy Sheriff Rogelio Reyes, a bilingual officer, contacted Martinez after Deputy Washington summarized what had happened. Martinez allowed Deputy Reyes inside the house and again denied that Rebecca had visited. Deputy Reyes noticed that the home smelled like fresh paint and was sparsely furnished and it appeared to him that no one lived there. Deputy Reyes viewed the rest of the house and saw a car bench seat and a back bedroom painted blue that matched Rebecca's description of where the touching had occurred. Martinez then admitted that a girl had been at the house and that he had initially lied because he did not want to get into trouble.

Deputy Reyes told Martinez that they needed to talk more seriously and started tape recording the conversation. Martinez admitted sitting on the car seat, placing Rebecca on his lap, stroking her hair and offering her a children's book. He then stated that the girl got up to roam the house and he got the idea to go inside the bedroom. Once inside the bedroom, Martinez stroked Rebecca's back with one hand and rubbed her underwear over her vaginal area. Martinez denied asking Rebecca if the touching felt good, but admitted touching her for sexual gratification. Martinez said he then unlocked the door and let Rebecca leave the house. Martinez repeated the same statements during a second tape recorded interview after he had been read his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Two days later, a social worker interviewed Rebecca.

An information was filed charging Martinez with one count of committing a lewd act upon a child. Martinez pleaded guilty to the charge and agreed to a three year prison

term, but later sought to withdraw his plea. Attorney Genaro Lara was appointed as conflicts counsel and the trial court ultimately let Martinez withdraw his guilty plea. After discussing similar cases with other prosecutors and doing some legal research, the prosecutor determined that residential burglary was a viable charge. She announced her intention to file additional charges at a trial readiness conference and offered Martinez the opportunity to plead guilty to one count of lewd conduct with "a stipulated prison term, and a maximum of six years" in prison. Martinez rejected the plea and the People dismissed the original case and filed a new case, charging Martinez with two counts of committing a lewd act upon a child and one count of burglary.

Thereafter, Martinez unsuccessfully moved to disqualify the district attorney's office and dismiss the charges on the ground the district attorney had engaged in vindictive and retaliatory prosecution. After numerous defense motions, the matter finally proceeded to trial with a jury finding Martinez guilty on all three charges. The jury also found that Martinez committed one of the acts during the burglary of a room, was a stranger to the victim and had substantial sexual contact with her. After defense counsel unsuccessfully moved to disqualify the trial judge and for a new trial, the trial court sentenced Martinez to a total of 15 years to life in state prison. Martinez appeals.

DISCUSSION

I. Burglary Findings

1. Facts

On the day of the incident, Martinez told Deputy Reyes that his in-laws owned the home and he planned to live there in the future, but that he currently lived in an apartment

in Vista. Martinez's wife, Berta Lizbeth Garcia Hernandez, also told Deputy Reyes that they planned to live at the home as tenants. Hernandez later testified at trial that she, Martinez and their children had slept at the house the night before Martinez's arrest and had moved some clothing and blankets into the house; however, other than a blanket on top of the car seat and two underneath the car seat, Deputy Reyes saw no bedding or pillows anywhere in the house and it did not appear to him that anyone had spent the night there. Photographs of the home taken the day of the incident showed it was sparsely furnished.

Hernandez also testified that the family had lived with her parents in an apartment for about four years and that their personal belongings were still at the apartment on the day of the incident. Hernandez stated that her father had recently purchased the home and the family had permission to move into the home to live with her parents. The family would be living at the house at her parent's pleasure; they did not have permission to harm the house or a child therein and would be paying rent. After the incident, Hernandez and her parents moved items into the home, but at the time of trial she and Martinez lived in an apartment.

2. Analysis

Martinez contends the evidence was insufficient to support his burglary conviction or the one strike burglary finding because he could not burglarize his own residence. In reviewing challenges to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could find guilt beyond a reasonable

doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before a judgment of conviction can be set aside for insufficiency of the evidence, it must clearly appear that on no hypothesis is there sufficient evidence to support the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-578.)

Any person who enters a house or room with the intent to commit a felony or theft is guilty of burglary (Pen. Code, § 459; *People v. Horning* (2004) 34 Cal.4th 871, 903), except one cannot be found guilty if he has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent. (*People v. Salemm* (1992) 2 Cal.App.4th 775, 781.) Additionally, a person who enters a dwelling with an innocent purpose, forms a felonious intent once inside, and then enters a separate room in the dwelling to commit the felony is guilty of burglary. (*People v. Sparks* (2002) 28 Cal.4th 71, 73.)

Here, Martinez told the deputies that he did not own the home and lived elsewhere. Deputy Reyes's observations and photographs of the home supported a conclusion that no one lived there. While Hernandez's testimony that the family had slept at the house the night before the incident suggested that the molestation occurred inside Martinez's own home, the trier of fact could have reasonably rejected this testimony and relied on Martinez's statements to the deputies that he lived elsewhere. In fact, by the time of trial Hernandez and Martinez lived in an apartment, not at the home, and there was no evidence presented showing Martinez or Hernandez had ever paid any rent to stay in home. Additionally, Martinez did not have an absolute possessory right to be inside the home; rather, his right was conditioned on the consent of his in-laws as he planned to

live there at their "pleasure" and did not have permission to harm the house or molest a child therein. Thus, while the evidence revealed that Martinez had the right to enter the home, it did not show that he had an unconditional possessory right to enter. (*People v. Pendleton* (1979) 25 Cal.3d 371, 382 ["one may be convicted of burglary even if he enters with consent"].)

Even assuming Martinez had moved into the home and a landlord-tenant relationship existed between him and his in-laws at the time of the incident, the evidence still supported a burglary finding. Martinez led Rebecca from a common area of the home into a bedroom to fondle her and the jury could have reasonably inferred that Martinez did so after deciding to molest her. Martinez, however, presented no evidence showing that his unconditional right to enter included this particular bedroom. (See *People v. Sparks, supra*, 28 Cal.4th at p. 86, fn. 18 [citing a Rhode Island opinion holding that "while one may have permission to enter parts of a dwelling, entry into a room within that dwelling that a person does not have permission to enter can constitute burglary"]; *People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521 ["there may be more than one dwelling under the same roof"].)

II. Jury Instructions

Martinez argues that an unconditional possessory right to enter was a defense to the burglary allegations and that the trial court erred in not sua sponte instructing the jury on the legal definition of an unconditional possessory right to enter. We conclude that the trial court did not have a sua sponte obligation to instruct on this defense.

A trial court has a sua sponte duty to instruct the jury "on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Such a duty includes an obligation to instruct on a defense that the defendant is relying on or a defense that is supported by substantial evidence and not inconsistent with the defendant's theory of the case. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) However, where the evidence is minimal and insubstantial, there is no sua sponte duty to give a defense instruction. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1152.)

The trial court properly instructed the jury that to establish a burglary, "each of the following elements must be proved: [¶] 1. A person entered a room; and [¶] 2. At the time of the entry, that person had the specific intent to commit the crime of Lewd Act Upon a Child[.]" (CALJIC No. 14.50.) This instruction is consistent with the law, pursuant to which an unconditional possessory right to enter is a defense to, rather than an element of, burglary. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397 [lack of consent to enter a building is not an element of burglary; however, consent to enter, such as when the accused has an unconditional possessory right to enter, is a defense to burglary].)

Martinez raised the defense as a legal matter to the trial court in an unsuccessful motion for directed verdict and the prosecutor addressed the concept in her closing argument, anticipating that Martinez would rely on the defense. Martinez, however, did not raise the defense in closing argument and instead argued that the claimed incident did not occur. Thus, Martinez did not rely on this defense at trial.

Additionally, evidence supporting the defense was minimal, consisting of Hernandez's testimony that the family had slept at the house the night before the incident and were planning to live there as tenants. The balance of the evidence, including Martinez's statements to the deputies, photographs of the home and Deputy Reyes's observations, established that, while Martinez planned to live at the home, he did not own it and had not yet moved in. Moreover, there was no testimony elicited showing Martinez ever lived at the home and Hernandez's testimony that she lived with Martinez in an apartment suggests he never lived there. In any event, even assuming Martinez had moved into the house as a tenant, he presented no evidence showing he had an absolute right to enter the bedroom where the molestation occurred. Accordingly, the trial court did not err by failing to sua sponte instruct the jury on this defense.

III. *Ineffective Assistance of Counsel*

Martinez claims his counsel was constitutionally ineffective because he: (1) failed to request that the jury be instructed that having an unconditional possessory right to enter a residence is a defense to the burglary allegations; (2) failed to argue this defense to the jury; and (3) made other errors that reflected a misunderstanding of the law. To demonstrate ineffective assistance of counsel a defendant must establish that his counsel's performance was deficient and that these deficiencies were prejudicial in the sense that they undermine confidence in the outcome. (*People v. Jennings* (1991) 53 Cal.3d 334, 357.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions" (*People v. Holt* (1997) 15 Cal.4th 619, 703) and will reverse on the ground of inadequate assistance of counsel only

if the record affirmatively discloses that counsel had no rational tactical purpose for his act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Here, counsel made a tactical decision to abandon the unconditional possessory interest defense as he was obviously aware of the issue, having argued it in a motion to the court. Further, the fact that Martinez's statements to the deputies and Hernandez's trial testimony contradicted the defense supports the reasonableness of such a decision. (See *People v. Constancio* (1974) 42 Cal.App.3d 533, 546 ["It is not incumbent upon trial counsel to advance meritless arguments . . . merely to create a record impregnable to assault for claimed inadequacy of counsel"].)

Counsel's clear strategy was to have Martinez acquitted of all charges by arguing that the incident never happened and the record reveals he vigorously pursued this defense. Rebecca testified that she talked to her parents about the incident and had spoken to the prosecutor about ten times. During cross-examination, counsel elicited testimony from Deputy Reyes about lying to Martinez to trap him and from the social worker about suggestibility in children. The social worker admitted that children perceive their parents and other adults as authority figures, that a person with authority is more likely to influence a child and that interviewers use leading questions out of necessity. She also admitted that although Rebecca did not know the difference between night and day and stated that the incident occurred when it was starting to get dark, she did not collect information from other people as to Rebecca's ability to recognize simple things. During closing argument, defense counsel highlighted this evidence and explained that a skillful police officer could get people to admit to things they had not done.

Finally, Martinez contends that his counsel was ineffective during pretrial motions and made errors that reflected a misunderstanding of the law. Even assuming defense counsel erred during pretrial motions, Martinez has not shown how these alleged errors affected his rights or impacted defense counsel's effectiveness at trial. In summary, while another attorney may have decided to pursue both defenses, Martinez has not overcome the presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. Accordingly, we reject Martinez's assertion that he received ineffective assistance because either defense counsel used reasonable tactics or the tactics caused him no prejudice.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.